No. 08-1439

FILED
JUN 2 2 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

SUSAN ROE, JR. and JANE DOE, JR.,

Petitioners,

v.

The CITY OF WATERBURY and PHILIP GIORDANO, Individually and in his Official Capacity as the Mayor of Waterbury,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ELLIOT B. SPECTOR
NOBLE, SPECTOR & O'CONNOR, PC
One Congress Street
Hartford, CT 06114
(860) 525-9975

Attorney for Respondents the City of Waterbury and Philip Giordano, in his official capacity

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court's finding that the Mayor's personal actions in sexually abusing two minors did not constitute an official policy of the City thus entitling the City to summary judgment, was appropriate.

TABLE OF CONTENTS

Page

Statement of Question Presented for Review i

Table of Contents ii

Table of Authorities iv

Statement of the Case 1

I. Facts Relevant to the Petition 1

II. Procedural History and Opinions 1

Reasons for Denying the Writ 2

1) The Second Circuit Court of Appeals' opinion affirming the grant of summary judgment by the District Court in favor of the City of Waterbury was in conformance with the rules and standards set by Federal Rules of Civil Procedure 56(c) 3

2) The Supreme Court is not the proper venue to challenge the FRCP Rule 56(c) procedure or standards 3

3) The application of summary judgment in this case and in general does not deny plaintiffs with meritorious claims the opportunity to proceed to trial 4

4) Summary judgment as applied in this case and in general serves legitimate governmental, judicial and societal interests 6

TABLE OF CONTENTS – Continued

Page

5) The Second Circuit Court of Appeals' ruling affirming the District Court's decision that Giordano was not an official policymaker with respect to the area of policy that encompassed his tortious act was consistent with all Supreme Court precedent 7

6) The law regarding policymaker liability and the standards of FRCP Rule 56(c) are clearly established and there is no split of authority in the circuits on these issues 10

Conclusion..... 12

TABLE OF AUTHORITIES

Page

CASES:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 3, 4, 5

Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937 (2009) 7

Beard v. Banks, 548 U.S. 521 (2006) 4

Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996) 11

Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997) 8, 9

Bolton v. City of Dallas, TX, 541 F.3d 545 (5th Cir. 2008) 11

Brosseau v. Hogan, 543 U.S. 194 (2004) 4

Bryant v. Maffucci, 923 F.2d 979 (2d Cir. 1991) 5

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 3, 5

Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 129 S.Ct. 846 (2009) 4

Doe v. City of Waterbury, 453 F.Supp.2d 537 (D. Conn. 2006) 2, 8

Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) 10

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 3

TABLE OF AUTHORITIES – Continued

Page

McMillian v. Monroe County, 520 U.S. 781 (1997) 7, 8, 11

Nebraska v. Wyoming, 507 U.S. 584 (1993) 5

Patterson v. Utica, 370 F.3d 322 (2d Cir. 2004) 10

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 8

Roe v. City of Waterbury, 542 F.3d 31 (2d Cir. 2008) 2, 3, 11

Rookard v. Health & Hospitals Corp., 710 F.2d 41 (1983) 10

Siegert v. Gilley, 500 U.S. 226 (1991) 7

Turner v. Upton County, TX, 915 F.2d 133 (5th Cir. 1990) 11

Williams v. Butler, 863 F.2d 1398 (8th Cir. 1988) 10

STATUTES/RULES:

18 U.S.C. §242 1

42 U.S.C. §1983 2

Federal Rules of Civil Procedure 8(a) 3

Federal Rules of Civil Procedure 56(c) 2, 3,4, 10

STATEMENT OF THE CASE

I. Facts Relevant to the Petition:

Before Phil Giordano was elected Mayor, he met Guitana Jones, a prostitute and crack addict who provided sexual favors to Giordano in exchange for money. Giordano was elected Mayor of the City of Waterbury, Connecticut, in 1995. From approximately November of 2000 to July of 2001, Jones brought her ten year old niece, Jane Doe, Jr., and her eight year old daughter, Susan Roe, Jr., to the Mayor to engage in sexual acts. Giordano arranged with Jones for those sexual encounters through the use of a cellular phone paid for by the City, and sexually abused the plaintiffs on numerous occasions at the Mayor's Office, in his home, and in his City issued police cruiser. Giordano was arrested and charged with depriving the plaintiffs of their constitutionally protected rights under 18 U.S.C. §242. During Giordano's criminal trial, Roe and Doe testified about the sexual acts and Roe further testified that after each encounter Giordano declared that if she told anyone about the sexual acts that her mother would go to jail. The jury found Giordano guilty of seventeen counts including two counts charging Giordano with acting under color of law to deprive Doe and Roe of their constitutional rights.

II. Procedural History and Opinions:

In December of 2001, Roe and Doe individually commenced civil actions against Giordano in both his

official and individual capacities and against the City of Waterbury seeking damages for violations of 42 U.S.C. §1983 and state law violations based on the same conduct that resulted in Giordano's convictions.

Both plaintiffs and the defendant, City, moved for summary judgment. The District Court granted plaintiffs' summary judgment motion against Giordano as to the claims brought against him in his individual capacity. The District Court also granted the City of Waterbury's summary judgment motion dismissing all claims brought against the City. *Doe v. City of Waterbury*, 453 F.Supp.2d 537 (D. Conn. 2006). On September 11, 2008, the Second Circuit Court of Appeals affirmed the grant of summary judgment by the District Court in favor of the City, 542 F.3d 31 (2d Cir. 2008).

REASONS FOR DENYING THE WRIT

In order to reverse the lower court decisions the petitioners are asking the Court to eliminate or at least modify the standards of Rule 56(c) summary judgment and to create a new application of public policymaker liability which is inconsistent with decades of precedent established by the Supreme Court and followed consistently by all Appellate Courts.

1) The Second Circuit Court of Appeals' opinion affirming the grant of summary judgment by the District Court in favor of the City of Waterbury was in conformance with the rules and standards set by Federal Rules of Civil Procedure 56(c).

The Court strictly complied with the summary judgment standards in FRCP 56(c) providing that summary judgment shall be "rendered if the pleadings, the discovery and disclosure materials in the files, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2008). The Court then explicitly adopted the standards applied to a Rule 56(c) motion under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

2) The Supreme Court is not the proper venue to challenge the FRCP 56(c) procedure or standards.

Petitioners' general attack on the summary judgment process which is established by federal rules is better addressed by the Federal Rules Committee. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) the issue in the pleading requirements of Federal Rules of Civil Procedure 8(a) were addressed. The Court decided that any added specificity to the pleading

requirements must be obtained by the process of amending the federal rules and not by judicial interpretation.

3) The application of summary judgment in this case and in general does not deny plaintiffs with meritorious claims the opportunity to proceed to trial.

Petitioners claim that the summary judgment process may amount to a violation of the 7th Amendment right to trial or at very least, as applied, is misused by courts. Even if there were some merit to this claim, the appropriate process as previously mentioned, would be a modification of the standards established under Rule 56(c). The reality is that the standards are so low and the advantages to the plaintiff are so great that only those cases totally lacking merit fail to survive the summary judgment process. The advantages provided to the party opposing a summary judgment motion and the minimal standards required to defeat a motion for summary judgment have been repeatedly applied by the United States Supreme Court and lower courts for more than three decades. The Courts have viewed all facts and drawn all reasonable inferences in favor of the non-moving party. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 129 S.Ct. 846, 848 (2009); *Beard v. Banks*, 548 U.S. 521, 529 (2006); *Brosseau v. Hogan*, 543 U.S. 194, 195 (2004); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

In order to defeat a motion for summary judgment, the opposing party need only demonstrate a genuine issue of material fact. *Anderson*, at 255. " . . . summary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.*, at 248.

All that the non-moving party need do to defeat summary judgment, is to "make a showing sufficient to establish the existence of an element essential to its case." *Nebraska v. Wyoming*, 507 U.S. 584 (1993) *citing Celotex*, 477 U.S. at 322.

The minimal evidence necessary to defeat a motion for summary judgment is similar to that required for a directed verdict. *Anderson*, 477 U.S. at 251. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*, at 251, 252.

In keeping with these low standards, the Second Circuit will not allow summary judgment when reasonable minds could differ as to the import of the evidence. *Bryant v. Maffucci,* 923 F.2d 979, 982 (2d Cir. 1991), *cert den.*, 502 U.S. 849 (1991).

4) Summary judgment as applied in this case and in general serves legitimate governmental, judicial and societal interests.

Petitioners argue that the misuse of the summary judgment process has unfairly denied some litigants their opportunity to proceed to trial. Given the above stated standards, this interest group would include those plaintiffs whose claims, as a matter of law, lack sufficient merit to proceed. If the longstanding summary judgment process were to be eliminated or modified to allow more litigation on behalf of questionable claimants, the interests of many more would be compromised. Defendants who have not committed wrongdoing would be forced to expend unnecessary time and money defending themselves. The judicial system would be unnecessarily burdened with litigating cases, thereby interfering with the opportunity of claimants with meritorious cases from seeking expeditious remedies for their losses. In addition, some plaintiffs who are entitled to judgment as a matter of law might also be denied more expeditious remedy. In fact, petitioners, who are now criticizing the use of summary judgment, sought and were granted summary judgment against Giordano in the instant action.

If the present case were to proceed, the burden of defending these unnecessary claims would fall on governmental officials and taxpayers. Although in a far different context the Supreme Court described these burdens.

> The basic thrust of the qualified immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (KENNEDY, J., concurring in judgment). There are serious and legitimate reasons for this. If a government official is to devote time to his or her duties, and to the formulation of sound and reasonable policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and re-execution of the work of the Government.

Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937 (2009).

5) The Second Circuit Court of Appeals' ruling affirming the District Court's decision that Giordano was not an official policymaker with respect to the area of policy that encompassed his tortious act was consistent with all Supreme Court precedent.

"Our cases on the liability of local governments under Section 1983 instruct us to ask whether government officials are final policymakers for the local government in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520

U.S. 781, 787 (1997). "An official has final authority if his decisions, at the time they are made, 'may fairly be said to represent official policy.'" *Id.*, at 784.

"In order to fairly assess liability, particularly when municipal liability is at issue, courts must separate the acts of the policymaker as policymaker, which could potentially impose liability on the municipality, from the acts of policymaker as an individual." *Doe v. City of Waterbury*, 453 F.Supp.2d 537 at 544 referencing *Board of County Commissioners of Bryan County, Oklahoma v. Brown,* 520 U.S. 397, 403-07 (1997). " . . . the 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.,* at 543, *citing Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

> The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the moving force "behind the injury alleged." That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Brown, 520 U.S. at 404. Based on these longstanding clearly established principals creating the framework for policymaker liability the District Court and Second Circuit Court of Appeals determined that

Giordano's misconduct was not within the scope of his policymaking authority.

Applying the Supreme Court standards, the Second Circuit determined that Giordano was not authorized to make final policy for Waterbury by engaging in personal acts of sexual abuse, *id.*, at 546. Giordano acted in a manner not authorized by the Charter and therefore acted outside of the scope of his powers in sexually abusing the plaintiffs for his own personal gratification, *id.*, at 546, 547. In fact, Giordano's actions frustrated and contravened Waterbury's official policy.

The Court found that Giordano was not performing the functions of Mayor when he abused the plaintiffs.

> His behavior towards the plaintiffs was entirely personal and did not serve any public purpose. He was purposefully and actively breaking the law in contravening established policy, not for any purpose associated with the functions of his job as mayor, but for his personal gratification. Waterbury employed a tortfeasor, who happened to be at the apex of executive authority. Imposing liability on Waterbury in that instance would impermissibly blur the line between a municipality and its employees in a manner forbidden by *Monell* and subsequent decisions.

Id., at 546.

Petitioners contend that because Giordano was a high level official and was vested with general policymaking authority in a variety of issues that the City should be responsible for his tortious conduct. Their claim is unsupported by any evidence and contrary to existing law, and therefore does not warrant review by the Supreme Court.

6) The law regarding policymaker liability and the standards of FRCP Rule 56(c) are clearly established and there is no split of authority in the circuits on these issues.

The petitioners have not presented a unique legal issue or evidence of a split of authority on the issues in question. Their opinion that the summary judgment process is misused or that the Supreme Court should agree with their interpretation of policymaker liability does not warrant review. The petitioners have cited some cases which they contend support their position. The Second Circuit Court of Appeals adequately distinguished those cases. In *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985) the plaintiffs proved that the mayor had authority under the governmental structure of the City to have the plaintiffs arrested. In *Williams v. Butler*, 863 F.2d 1398 (8th Cir. 1988) the plaintiffs proved that the traffic court judge had exclusive authority to hire and fire the plaintiffs. In *Patterson v. Utica*, 370 F.3d 322 (2d Cir. 2004) and *Rookard v. Health & Hospitals Corp.*, 710 F.2d 41 (1983), the officials had authority

to take action with regard to the employment related claims. However, in the instant case Giordano had no authority to make policy authorizing, condoning or promoting the sexual abuse of children. *Roe,* at 40.

The Fifth Circuit Court of Appeals provided two cases which could also be distinguished. In *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996) the sheriff used his authority over an investigation to coerce the plaintiff to have sex and in *Turner v. Upton County, TX,* 915 F.2d 133 (5th Cir. 1990), a sheriff was found to be a final policymaker when he abused powers vested in his position and planted illegal drugs in the plaintiff's business. The Second Circuit properly noted that at least there was a nexus between the sheriff's actions and his job functions. There was no nexus between Giordano's sexual abuse and his duties as mayor.

More recently the Fifth Circuit has demonstrated that it is, in fact, in line with the prior stated Supreme Court precedent and the Second Circuit's application of the law regarding policymaker liability in granting the City's motion for summary judgment. In *Bolton v. City of Dallas, TX*, 541 F.3d 545 (5th Cir. 2008), the former police chief sued the town manager for terminating him. The Fifth Circuit explained that the "court's task is to identify those officials or governmental bodies who speak with final policy-making authority for the local governmental act or concerning the action alleged to have caused a particular constitutional or statutory violation at issue," *citing, McMillian* at 520 U.S. 784-85. The

court held that even though the town manager had discretion to hire and fire, he was not considered a final policymaker and the City of Dallas could not be held liable for the termination because state and local law did not authorize him to make a decision to terminate the employment of the sheriff.

Neither state law nor Waterbury's charter authorized Giordano to exercise any official authority to engage in the sexual assault of children. He was not acting as a policymaker for the City of Waterbury and summary judgment was appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ELLIOT B. SPECTOR
NOBLE, SPECTOR & O'CONNOR, PC
One Congress Street
Hartford, CT 06114
(860) 525-9975

Dated: June 22, 2009